

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Angela Berger,

Complainant,

vs.

John Cashmore

Respondents.

**PROBABLE CAUSE  
ORDER**

**TO: Angela Berger 4809 60<sup>th</sup> St. W, Edina, MN 55424; and John Cashmore 5313 Chantrey Road, Edina, MN 55436**

On October 2, 2012, the Complainant, Angela Berger, filed a complaint under the Fair Campaign Practices Act. The above-entitled matter came on for a probable cause hearing as provided by Minn. Stat. § 211B.34, before Administrative Law Judge James E. LaFave on October 9, 2012. The probable cause hearing was conducted by telephone conference call. After the probable cause hearing Ms. Berger requested to amend her Complaint to include the person who prepared the mailing in question.

Angela Berger, the Complainant, appeared on her own behalf and without counsel. John Cashmore, the Respondent, appeared on his own behalf without counsel.

Based upon the record and all the proceedings in this matter, and for the reasons set forth in the attached Memorandum incorporated herein, the Administrative Law Judge makes the following:

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. There is probable cause to believe that Respondent John Cashmore violated Minn. Stat. § 211B.06 by knowingly disseminating false campaign material concerning the personal or political character or acts of candidate Bill Glahn.

2. This matter is referred to the Chief Administrative Law Judge for assignment to a panel of three Administrative Law Judges, pursuant to Minnesota Statute § 211B.35.

3. Should the Parties decide that the attached Memorandum adequately summarizes the arguments made at the probable cause hearing, and that this matter may be submitted to the assigned Panel based on this Order and the exhibits received into the record without an evidentiary hearing, they should notify the undersigned Administrative Law Judge by **4:30 p.m. on Tuesday, October 23, 2012**. If both Parties

do not agree to waive their right to an evidentiary hearing, this matter will be scheduled for an evidentiary hearing in the near future.

4. The Complainant's request to amend her Complaint is **DENIED**.

Dated: October 16, 2012

s/James E. LaFave

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JAMES E. LAFAVE  
Administrative Law Judge

### MEMORANDUM

This case concerns a mailing that was disseminated regarding the Bill Glahn, Ron Erhardt race for the seat in the Minnesota House of Representatives from District 49A. The mailing was a 8½" X 5 ½" postcard distributed by Intelligent Choices Minnesota, a 501(c)(4) non-profit association formed by the Respondent, John Cashmore.

The Complaint alleges that the mailing contained two false statements.

(1) Candidate Bill Glahn actually said that he will lie to the public in one of his online blogs, which he has now hidden; and

(2), Bill says 'Elite' people like himself should lie to the public to achieve goals.

The mailing claimed it had "fully documented information" and referenced Mr. Glahn's blog "Hypocrisy is Good" as factual support for the statements in the mailing.<sup>1</sup>

The Complainant, Ms. Berger, maintains the alleged false statements do not appear in Mr. Glahn's blog, that they distort the meaning of the blog, and that they were disseminated with the intent to slander Mr. Glahn.

Minn. Stat. § 211B.06, Subd. 1 states:

A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote or defeat a candidate for nomination or election to a public office or top

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<sup>1</sup> Attachments to the Complaint, taken from the Intelligent Choices Minnesota (ICM) web site, state that Mr. Glahn's blog disappeared from the internet after he received his party's endorsement but that a member of ICM copied them before they disappeared.

promote or defeat a ballot question, that is false, and the person knows is false or communicate to others with reckless disregard of whether it is false.

The purpose of a probable cause determination is to determine whether, given the facts disclosed by the record, it is fair and reasonable to hear the matter on the merits.<sup>2</sup> If the judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict, a motion to dismiss for lack of probable cause should be denied.<sup>3</sup> A judge's function at a probable cause hearing does not extend to an assessment of the relative credibility of conflicting testimony. As applied to these proceedings, a probable cause hearing is not a preview or a mini-version of a hearing on the merits; its function is simply to determine whether the facts available establish a reasonable belief that the Respondent has committed a violation. At a hearing on the merits, a panel has the benefit of a more fully developed record and the ability to make credibility determinations in evaluating whether a violation has been proved, considering the record as a whole and the applicable evidentiary burdens and standards.

Respondent Cashmore does not dispute that the alleged statements appear on the mailing in question. He argues, however, the statements are essentially true and do not violate the terms of Minn. Stat. § 211B.06. He went on to state the Complaint was frivolous and should be dismissed.

Respondent Cashmore argued there are no quotation marks on the statements and therefore do not have to appear word for word in the blog "Hypocrisy is Good" to be supported by that blog. He went on to point out the definition "hypocrisy" is a "feigning to be what one is not or to believe what one does not; *especially*: the false assumption of virtue or religion."<sup>4</sup> Therefore, if Mr. Glahn is in favor of "hypocrisy", one can reasonably infer he is a liar and by extension that he would "lie" to the public.

Respondent Cashmore defended the statement "'Elite' person like himself should lie to the public to achieve goals", by pointing to the concluding paragraph in the blog "Hypocrisy is Good". That paragraph states "[T]o reverse these disturbing trends, if it takes a little hypocrisy among our elites, then sign me up."<sup>5</sup> He argued "our" in that statement was inclusive, therefore Mr. Glahn was one of the "elite". And again, that from Mr. Glahn's conclusion one could reasonably infer he would "...lie to the public to achieve goals."

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<sup>2</sup> *State v. Florence*, 239 N.W.2d 892, 902 (Minn. 1976).

<sup>3</sup> *Id.* at 903. In civil cases, a motion for a directed verdict presents a question of law regarding the sufficiency of the evidence to raise a fact question. The judge must view all the evidence presented in the light most favorable to the adverse party and resolve all issues of credibility in the adverse party's favor. See, e.g., Minn. R. Civ. P. 50.01; *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975); *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980). The standard for a directed verdict in civil cases is not significantly different from the standard for summary judgment. *Howie v. Thomas*, 514 N.W.2d 822 (Minn. App. 1994).

<sup>4</sup> See Merriam-Webster Dictionary.

<sup>5</sup> See Blog "Hypocrisy is Good" attached to Complaint.

Freedom of speech in political discourse is at the bedrock of our first amendment protections. However, the Minnesota Legislature in promulgating Minn. Stat. § 211B.06 has determined, as a matter of principal, there are bounds to political speech. The Minnesota Supreme Court has ruled that Minnesota campaign law which prohibits a false claim of endorsement only regulates false statements.<sup>6</sup> The United States Supreme Court has stated that “(u)ntruthful speech ... , has never been protected for its own sake”<sup>7</sup> The statements in the mailing appear, at first blush, to be a false attack on the personal or political character of candidate Glahn which the Respondent knew was false or made with reckless disregard as to whether or not it was false.

The Administrative Law Judge concludes that based on the record presented, the Complainant has demonstrated probable cause to believe that the Respondent violated Minn. Stat. § 211B.06. It is therefore reasonable to require the Respondent to go to hearing on the merits and to allow a panel of three Administrative Law Judges to determine whether the Respondents violated Minn. Stat. § 211B.06, and in the event a violation is found what penalty may be appropriate.

Finally, regarding the Complainant’s request to amend, if the Complainant is still interested in including the author of the mailing in these proceedings she should, at her earliest convenience, file a new complaint against that person. In the event a prima facie violation is found and probable cause demonstrated, that complaint may be joined with the current complaint prior to an evidentiary hearing. It would be up to the Chief Administrative Law Judge to determine whether to consolidate the cases.<sup>8</sup>

**J. E. L.**

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<sup>6</sup> See *Schmidt v. McLaughlin*, 275 N.W.2d 587 (Minn. 1979).

<sup>7</sup> *Virginia State Board of Pharmacy v. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed. 346, 364 (1976).

<sup>8</sup> See Minn. Stat. § 211B.33, subd. 4.